United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2317

To be argued by:

GEORGE SHEINBERG, ESQ.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-2317

UNITED STATES OF AMERICA,

Appellee,

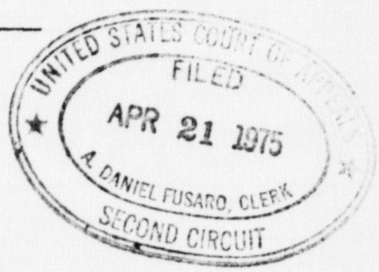
-against-

ALFONSO MELO OBANDO,

Appellant.

On Appeal from the United States District Court
for the Eastern District of New York.

BRIEF FOR APPELLANT



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STATEMENT OF ISSUES

The single issue raised on this appeal is whether proof of appellant's participation in a single isolated narcotics transaction constituted sufficient evidence to support his conviction on a charge of conspiring to import and distribute large shipments of cocaine.

STATEMENT OF FACTS

Appellant ALFONSO MELO OBANDO was charged in the United States District Court for the Eastern District of New York under Indictment #74 CR 14 with entering into a conspiracy to import and distribute large amounts of cocaine in violation of Title 21, U.S.C., Sections 812, 841(a)(1), 841(b)(1)(A), 952(a), 960(a)(1) and 960(b)(1). Nine others were also charged under the indictment.

Obando and two other defendants, CARLOS BAEZA and ALFREDO VARGAS VEGA, were tried on these charges before CHIEF JUDGE JACOB MISHLER and a jury. A verdict of guilty was found as to each of the defendants.

On October 4, 1974, Obando was sentenced by Judge Mishler to a two year term of imprisonment and to a special parole term of 10 years under condition that he not re-enter the United States during the term of that parole.

Obando appeals from that judgment of conviction.

THE TRIAL

I-THE GOVERNMENT'S CASE:

The government's direct case dealt with acts allegedly committed between June, 1973 and November, 1973. The evidence presented was concerned almost exclusively with the conduct of Baeza, JUAN OSORIO and the other co-conspirators, with the exception of Obando and Vega. The direct evidence against the latter two covered a period between the hours of 12 and 2

P.M. on November 16, 1973.

The trial testimony relevant to the issue raised on this appeal will be discussed fully in the Argument below.

II-OBANDO'S CASE:

Obando testified in his own behalf that he had no knowledge of the alleged conspiracy or of the importation of cocaine. He was asked by Vega, who was an acquaintance, to deliver a package to one CARLOS MUNOZ and to take Munoz, whom he had never met, to the airport. For his efforts, Obando was to receive the sum of $50.00.

Obando further testified that he did not know that the package contained money until Munoz opened it in his presence. Nor did he know that the suitcases which were carried to his car contained cocaine.

Obando presented no other defense.

III-CO-DEFENDANTS' CASES:

Baeza presented a lengthy defense through several witnesses. It is not relevant to the issue on this appeal.

Vega offered no evidence.

IV-GOVERNMENT'S REBUTTAL:

A rebuttal limited to the defense presented by Baeza was introduced through the testimony of one SELIN VALENZUELA, a self-described "manufacturer of cocaine". The testimony is not relevant to this appeal.

ARGUMENT

PROOF OF APPELLANT'S PARTICIPATION IN A SINGLE ISOLATED NARCOTICS TRANSACTION DID NOT CONSTITUTE SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR CONSPIRACY.

The "single-transaction" set of facts has formed the basis for numerous previous decisions by this court.

United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974), United States v. DeNoia, 451 F.2d 979 (2d Cir. 1971), United States v. Agueci, 310 F.2d 817 (2d Cir. 1962), cert. denied 372 U.S. 959, 83 S.Ct. 1013, 10 L. Ed. 2d 11 (1963), United States v. Santore, 290 F.2d 51 (2d Cir. 1959), cert. denied 365 U.S. 834, 81 S.Ct. 745, 5 L.Ed. 2d 743 (1961); United States v. Aviles, 274 F.2d 179 (2d Cir. 1960), cert. denied 362 U.S. 982, 80 S.Ct. 1073, 4 L.Ed. 2d 1016, United States v. Stromberg, 268 F. 2d 256 (2d Cir. 1959), cert. denied 361 U.S. 863, 80 S.Ct. 119, 4 L.Ed.2d 102 (1959), United States v. Reina, 242 F.2d 302 (2d Cir.), cert. denied 354 U.S. 913, 77 S.Ct. 1294, 1 L.Ed. 2d 1427 (1957). As a result of these and similar cases, legal principles have evolved and crystallized into a "single transaction rule":

> "For a single act to be sufficient to draw an actor within the ambit of a conspiracy to violate the federal narcotics laws, there must be independent evidence tending to prove that the defendant in question had some knowledge of the broader conspiracy, or the single act itself must be one from which such knowledge may be inferred." United States v. Sperling, supra at 1342, citing United States v. DeNoia, supra, and United States v. Agueci, supra.

In the instant case Obando was charged with conspiracy to violate federal narcotics laws together with nine other co-conspirators over a period of approximately seventeen months. The purpose of the conspiracy was to import large quantities of cocaine into both the United States and Canada.

The evidence against Obando dealt with a single transaction in which he delivered $13,000.00 to one Carlos Munoz and received two closed suitcases in which large amounts of cocaine were secreted. Obando was arrested immediately.

A brief discussion of the case presented against

Obando demonstrates that no evidence was introduced to show that he had knowledge of the larger conspiracy nor to demonstrate that his single act itself was one from which knowledge of that conspiracy could be inferred.

The conspiracy began in Chile in July, 1972. About a year later a merchant seaman named Carlos Munoz was recruited to carry cocaine from Chile to Canada and the United States. Baeza and Juan Osorio were the persons who allegedly initiated the proposal to Munoz. While feigning acceptance, Munoz went to the appropriate Canadian and American officials and became an informant for them almost immediately. From that point on surveillance and close contacts with Munoz were maintained by government agents, including the use of wiretaps, "bugs" and corroborating photographs. Obando was not seen, heard from or of, mentioned, described, or referred to as a participant in any illegal transaction concerned with the activities of the conspiracy.

In August, 1973 a large shipment of cocaine emanating from the conspiracy was seized in Toronto and two couriers arrested as a direct result of Munoz' cooperation and information. No evidence was presented to link Obando with that shipment.

In November, 1973 another large shipment of cocaine was brought into Canada by Munoz as the result of his discussions with Baeza and Osorio. At about the same time Baeza was arrested in Chile and the previous arrangements to retrieve the suitcases which Munoz used to carry the cocaine, together with their contents, were not fulfilled. After a fruitless week of waiting for the transfer, Munoz traveled to New York City and checked into a hotel for the purpose of effecting delivery of the narcotics. After several telephone calls to and from Chile and some additional local calls, arrangements were made for the suitcases to be picked up and a sum of money paid to Munoz. The transfer

was to take place in Munoz' hotel room. Neither Obando nor Vega was identified as a participant in any of those telephone conversations.

On November 16, 1973 at approximately 12:15 P.M. Obando telephoned Munoz' room from th hotel lobby and said that he was coming up. A few minutes later he knocked on Munoz' door and was admitted. Munoz pointed to the suitcases, which were closed, and described them as the "two patients". (Trial Transcript, hereafter"Tr.", 478-480). Munoz also stated to Obando that the suitcases were empty but quite heavy. (Tr. 568). Obando responded that it would have been better to fill them with clothing. (Tr. 480). The suitcases remained closed. (Tr. 576).

Munoz then requested his money and Obando stated that he was not the owner of "these things" but had been sent by someone and had $13,000.00 for Munoz, who insisted upon a receipt because he had to "give this money to Chile" and wanted them to be sure that it was $13,000.00. (Tr. 480) Obando then handed him $13,000.00 in $100.00 bills and signed a receipt in the name of "Alfredo", saying that he was not the owner and that the money was Alfredo's. (Tr.573)

Obando and Munoz then proceeded out of the hotel with each carrying one suitcase. As he was placing one of the suitcases into his car, Obando was placed under arrest by DEA agents. (Tr.480-481). A subsequent search of his person revealed a business card with the name "Alfredo" and a telephone number written on it. (Tr.744-745). It was later determined that the suitcases held approximately 13 pounds of cocaine in the inner linings.

The other evidence relating to Obando's activities came from the testimony of the arresting and surveilling agents who had him under observation on the day of his arrest. They observed him park his car near the hotel at approximately the same time as Vega and then en-

gage in 2 short conversations with Vega on the sidewalk in front of the hotel. The conversations were not overheard. Vega did most of the talking while Obando nodded from time to time. (Tr. 765-768).

Application of the principles of the "single-transaction rule" to the above facts requires the conclusion that the evidence was insufficient to support the conviction.

No independent evidence was presented which would tend to show that Obando had knowledge of the broader conspiracy. Aside from his conversation with Munoz in the hotel room, which will be discussed below, no statements by the defendant were offered. The single visual observation of Obando began when he parked in front of Munoz' hotel and ended with his arrest about 20 minutes later. Obando was not identified as a participant in any of the telephone conversations relating to the purposes of the conspiracy nor was any evidence introduced to establish his knowledge of the contents of those conversations. The only alleged co-conspirator with whom he was shown to have any contact was Vega and their short conversations were not overheard.

It must be assumed that Obando arrived at the hotel as a result of the telephone conversations which Munoz had concerning the pickup of the suitcases. However, no evidence was introduced to show that Obando received any information other than the instructions which he subsequently complied with. The evidence supports the conclusion that Obando did what he was told to do not that he knew why he was doing it.

Nor does the single act in which Obando participated support an inference of the required knowledge. The inference most favorable to the government's case which can reasonably be drawn is that Obando knew that the suitcases contained something which it was unlawful to possess. This general awareness of illegality can not be narrowed to exclude all but cocaine. Obando never saw the contents of the suitcases because they remained closed in his presence and Munoz' description of them as

"two patients" was ambiguous, at best. No evidence was introduced to demonstrate that Munoz was speaking with code words for cocaine. Obando already had reason to believe that something "funny" was in the suitcases. Munoz' words did not inform him in a more particularized way.

Since Munoz described the suitcases as heavy although empty, Obando could reasonably conclude that something was hidden inside. His suggestion that "it would have been better to fill them up with clothing" would apply equally well to any smuggled articles, not merely cocaine. Obando could have reasonably concluded that the suitcases contained counterfeit money, stolen jewelry, explosives or any other type of forbidden fruit. The knowledge which he had been demonstrated to possess excluded none of those possibilities or countless others. The possibilities were limitless because Obando possessed no specific knowledge, only the clear signals of illegality.

That the suitcases had been imported might reasonably be inferred from Munoz' expressed desire to get the money to Chile. But in view of the ongoing political upheaval there and the accompanying prohibitions on export, that fact would shed no light on what had been imported illegally. As to facts from which previous shipments could be inferred or the intention to make additional deliveries--there were none.

On facts similar to these this court has uniformly held such evidence to be insufficient to support a conviction for conspiracy.

In United States v. Sperling, supra, at 1342, a single delivery of cocaine by 3 defendants to a co-conspirator was held insufficient to support an inference of knowledge of the broader conspiracy. The same conclusion was reached in United States v. DeNoia, supra at 981 concerning a single delivery of heroin.

United States v. Stromberg, supra at 267, involved

a single transaction in which the defendant Snyder delivered 2 suitcases containing heroin to 2 co-conspirators. The evidence was held insufficient to support an inference that Snyder knew of, or accepted, the aims of the conspiracy or that his participation extended beyond that single act.

United States v. Aviles, supra, indicated that a lack of evidence of continuous dealing between the defendant and a seller defeated an inference that the defendant knew the seller's source. In the instant case Obando met Munoz only during this single transaction. Aviles also points out, at 189-190, that in multiparty conspiracies actors perform many different tasks and one contact with one member of a conspiracy might support an inference of knowledge of illegal importation but not of an existing conspiracy unless it was proven that the transferee had knowledge of the way in which the transferor came into possession of the contraband. Evidence of a knowledge of the conspiracy's existence and of the defendant's intent to associate himself with it was lacking. As discussed previously, such deficiencies are equally apparent in the present case.

In United States v. Reina, supra, at 306, it was held that the sale of a parcel of heroin was not, of itself, sufficient to demonstrate knowledge of the larger conspiracy, which consisted of a series of unlawful importations.

United States v. Agueci, supra at 836, dealt with a single transaction in which the conspiracy conviction was affirmed. In that case there was substantial independent evidence from which knowledge of the overall conspiracy could be inferred. Defendant Cottone met several members of the conspiracy; heard references to others; demonstrated knowledge of specific facts which only a conspirator would know and demonstrated in his conversations that he was "an old hand at the conspiratorial operation". None of those factors are present in the instant

case. Furthermore, the single transaction itself involved circumstances justifying the conclusion that the defendant Cottone had knowledge of the conspiracy. Unlike Obando, Cottone had actual knowledge that a trunk which he was assisting in procuring held narcotics. It was opened in his presence and he helped to tear open the bottom which contained blankets in which the narcotics had been hidden so that he also possessed actual knowledge of the quantity involved. Agueci demonstrates the type of evidence which is required to sustain a conviction and is totally consistent with the other single transaction cases.

Applying that same rule to the facts of this case requires a reversal of this conviction.

CONCLUSION

FOR THE FOREGOING REASONS THE CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

Sylvia E. Morris